

1 in June 1993. And despite the fact that you had a conversa-
2 tion with counsel about the handwritten notes, that you did
3 not think you preserved the handwritten notes as of September
4 1993?

5 A Yes. I mean, I'd like to state that there were a
6 few other things going on at the time that I was preparing
7 this testimony.

8 Q You knew you preserved the calendars, right?

9 A I knew the calendars were -- had been saved, yes.

10 Q Now, as of February 9, 1994, am I correct that you
11 did know that you had preserved Ms. Covington's handwritten
12 notes, didn't you?

13 A Yes, because I found a copy of a memo that I had
14 written to Baker & Hostetler with a copy of the notes
15 attached.

16 Q Did you make any effort to include that fact in your
17 direct case exhibit?

18 JUDGE SIPPEL: Which direct case --

19 WITNESS: Which direct case are you talking about?

20 MS. SCHMELTZER: I'm talking about SH36-13, the page
21 that's right in front of you. Is there any reference there to
22 correcting that fact relating to footnote 6?

23 MR. HOWARD: Objection. The document states what it
24 states.

25 JUDGE SIPPEL: Sustained.

1 MS. SCHMELTZER: Now, am I correct that as of Febru-
2 ary 9, 1994, the last sentence of footnote 6 was incorrect?

3 JUDGE SIPPEL: Asked and answered.

4 MS. SCHMELTZER: I don't know that I had a specific
5 answer to that question.

6 JUDGE SIPPEL: Yeah. I recall that you did.

7 MS. SCHMELTZER: I think I asked as of now. Now I'm
8 asking as of February 9, 1994.

9 MR. GREENEBAUM: I think her answer made it clear as
10 to exactly what she understood when. And whether it was asked
11 articulately or not, it was answered precisely.

12 JUDGE SIPPEL: Well, that's my recollection. And
13 besides, I -- the -- I mean, there's no -- there's -- you have
14 to lay a foundation that she actually was confronted with or
15 actually directed her attention to that last sentence of
16 footnote 6 on the 9th of February. It's, it's, it's asking
17 too much of this witness.

18 MS. SCHMELTZER: Did you review footnote 6 prior to
19 preparing your direct case exhibit, Ms. Barr?

20 JUDGE SIPPEL: Which one?

21 BY MS. SCHMELTZER:

22 Q Did you review footnote 6 of your September 13,
23 1993, written direct testimony prior to preparing your present
24 direct case testimony?

25 A Obviously it's referenced in my direct case

1 testimony.

2 Q Did you review the last sentence of footnote 6?

3 A I reviewed the, I reviewed the whole footnote.

4 Q And it did not occur to you to correct the last
5 sentence of --

6 MR. GREENEBAUM: Objection. Asked the --

7 JUDGE SIPPEL: Sustained.

8 MR. GREENEBAUM: -- same question a different way.

9 JUDGE SIPPEL: Sustained.

10 MR. GREENEBAUM: It seems to me if you go at it
11 three or four times it's still the same question.

12 JUDGE SIPPEL: Yes. I -- sustained. Sustained. I
13 think we ought to move on to a different subject. I think
14 footnote 6 has had it.

15 BY MS. SCHMELTZER:

16 Q All right. Now, you say in paragraph 38, Ms. Covin-
17 gton -- this is your written direct -- Ms. Barr -- your writ-
18 ten direct case testimony of September 2, 1994. You say that
19 after you discovered the copy of the 1992 Covington notes you
20 gave the copy to Ms. Abrutyn. Do you see that?

21 A Yes, I see it.

22 Q That was -- was that on February 9, 1994?

23 A Yes, it was.

24 Q Did you also give Ms. Abrutyn a copy of the June 25,
25 1993, memorandum to Mr. Roberts?

1 A I gave Ms. Abrutyn everything I found, which was the
2 memo with the notes attached.

3 Q And was it the next day that Ms. Abrutyn, or someone
4 from Baker & Hostetler, informed you that the original copy of
5 Ms. Covington's 1992 notes had been found?

6 MR. HOWARD: Objection. That's asked and answered.

7 MS. SCHMELTZER: No, it wasn't. I didn't ask it.

8 MR. HOWARD: This morning it was covered as -- when
9 she learned that the --

10 JUDGE SIPPEL: I had --

11 MR. HOWARD: -- originals had been found.

12 JUDGE SIPPEL: Yeah, this -- we went through this at
13 some length this morning. We did, Ms. Schmeltzer. I'm going
14 to sustain the objection. It's asked and answered.

15 BY MS. SCHMELTZER:

16 Q All right. Ms. Barr, I'd like to ask you some
17 questions about the information that you obtained from NBC in
18 the summer of 1992. If you'll turn to that portion of your
19 written direct case exhibit?

20 A Do you, do you know the page number?

21 Q Well, it begins at -- oh. Beginning at page 2 and
22 -- that section.

23 A All right.

24 Q Now, you state there that in response to a question
25 at your deposition on July 16, 1993, you stated that you did

1 not retain a copy of the facsimile. Do you see that? The
2 facsimile that you had sent to NBC in August of 1992?

3 A What -- are you on page 3?

4 Q Yes, paragraph 10.

5 A I see that statement.

6 Q And I believe you have a copy of your -- of portions
7 of your July 16, 1993, deposition in front of you? Do you --

8 A I, I have some pages, yes.

9 Q Okay. If you would look at what has the page number
10 105 up at the top?

11 A Okay.

12 Q Do you see line 8? The question is, "Did you write
13 any kind of a letter to NBC asking for this information?"
14 And your answer is, "No, I did not. I made a phone call."

15 MR. GREENEBAUM: Where is this again, Your Honor?
16 What is the question that she -- she hasn't asked her a ques-
17 tion to impeach her with. She's just using the deposition
18 again to, to, to read from.

19 MR. ZAUNER: Yeah. Nor is it being used to refresh
20 recollection.

21 MR. GREENEBAUM: I mean, there's no purpose in it
22 and I object to it.

23 JUDGE SIPPEL: What is, what is your purpose for
24 this?

25 MS. SCHMELTZER: Did you -- I'll be happy to ask a

1 question leading up to the deposition, Your Honor.

2 JUDGE SIPPEL: Well, lay a foundation --

3 MS. SCHMELTZER: Okay.

4 JUDGE SIPPEL: -- if you would. And what page are
5 you referring to? Because I'm having trouble finding it.

6 MS. SCHMELTZER: This is her July 16, 1993, deposi-
7 tion, page 105. July '93, not '94.

8 JUDGE SIPPEL: Well, I understand. I understand.

9 MS. SCHMELTZER: I think it's an attachment to that.

10 JUDGE SIPPEL: Yes, it is.

11 MS. SCHMELTZER: Yes.

12 JUDGE SIPPEL: And I'm trying to -- I'm just trying
13 to find the page. Page 10 --

14 MS. SCHMELTZER: Five.

15 JUDGE SIPPEL: 105. All right. Now, would you lay
16 a foundation, please, and we'll see what's going on?

17 BY MS. SCHMELTZER:

18 Q Did you write any kind of a letter to NBC asking for
19 information in August of 1992?

20 A Are you reading that question or are you asking me?

21 Q I'm asking you.

22 A I sent -- I wrote them a -- I sent them a fax in
23 memo form.

24 Q Do you recall being asked at your deposition whether
25 you wrote any kind of a letter to NBC asking for this

1 information?

2 A I was asked several times.

3 Q Do you recall saying the first time you were asked,
4 "No, I did not. I made a phone call."?

5 A I recall saying: "No, I did not. I made a phone
6 call." And then I recall saying: "Actually, I sent them a
7 fax."

8 Q And turning to page -- the bottom of page 108 and
9 the top of page 109, do you recall that the -- you requested
10 that the deposition -- "You mentioned that you gave NBC a list
11 of issues?"

12 Answer: "Yes."

13 Question: "Was that in writing?"

14 Answer: "No, it was not. Actually, it was faxed to
15 them."

16 Do you recall that?

17 A Yes.

18 Q Now --

19 MR. GREENEBAUM: Isn't that what she just said, Your
20 Honor?

21 MS. SCHMELTZER: Not exactly.

22 JUDGE SIPPEL: Well, I'm going to -- I'm, I'm going
23 to see where you, where you -- I see your point, Mr.
24 Greenebaum, but I'm going to let Ms. Schmeltzer finish this.
25 Go ahead.

1 MS. SCHMELTZER: Now, am I correct that at the
2 deposition you said you did not have a copy of the fax?

3 WITNESS: Which deposition?

4 MS. SCHMELTZER: At the July 16th --

5 MR. ZAUNER: Your Honor, are we through with --

6 MS. SCHMELTZER: -- 19--

7 MR. ZAUNER: -- this line where we had the two
8 questions that were asked and -- about the deposition and now
9 we're on to something else? Are we leaving that area with
10 nothing further? Is that the end of it? Did we just have an
11 interrogation of a witness for the purpose of, of reading into
12 the record what was in the deposition, which is consistent
13 with what she has in her exhibit? Are we wasting time here
14 doing that or is there, is there some --

15 MS. SCHMELTZER: Well, it's not --

16 MR. ZAUNER: -- purpose to this? What are we doing
17 here?

18 MS. SCHMELTZER: Mr. Zauner, it goes further than
19 what she has in her direct case.

20 JUDGE SIPPEL: Yeah, but it sounds to me like what
21 you're doing is you're just reading excerpts of the transcript
22 of the deposition into the record. It's not being used for
23 purposes of confronting this witness with something she's
24 testified to today either on the stand or in her testimony.
25 And, therefore, it's not serving any purpose except what it

1 appears to me, that you're just trying to get some evidence in
2 that otherwise wouldn't be in the record.

3 MS. SCHMELTZER: Well, no, Your -- that's not true,
4 Your Honor, because this is related -- this is -- led to the
5 addition of the issue, so it is relevant evidence.

6 JUDGE SIPPEL: Well, it's, it's -- but for cross-
7 examination purposes, you understand that you're using -- that
8 there are only limited purposes for the use of a deposition.
9 It's in connection with the testimony, not for purposes of
10 just reading it into the record. Well, that's, that's -- it
11 appears to me is what you're doing.

12 MS. SCHMELTZER: You permitted Mr. Greenebaum to
13 read lengthy excerpts from the depositions into the record at
14 the earlier stage of this proceeding.

15 MR. GREENEBAUM: That was completely a different
16 situation --

17 JUDGE SIPPEL: In which -- in, in the context of Ms.
18 Barr's testimony or --

19 MS. SCHMELTZER: No. No, no. In the context of
20 questioning Scripp-- Four Jacks principals.

21 MR. HOWARD: May I also point out that the rule
22 permits a party to use an adverse party's deposition for any
23 purpose --

24 MS. SCHMELTZER: Well, that's what --

25 MR. HOWARD: -- during the proceedings. The rule

1 expressly allows that, not a, not a principal, a principal.

2 JUDGE SIPPEL: Well, that's --

3 MS. ABRUTYN: I think the same situation --

4 JUDGE SIPPEL: That's in -- you know, that, that's
5 not -- yeah. That's not where we're trying to take this.
6 We're not trying to take this examination into that level and,
7 and we all know that. We all know that. If there was, we'd
8 be arguing motions for bringing it in. What we're trying to
9 do is, is -- what you're trying to do is test the credibility
10 of this witness, among other things.

11 But there is a use for this deposition testimony in
12 connection with what she's testified to today, and what I'm
13 seeing is is that you're not using it for that purpose. And
14 I, I've given this instruction before. If you're going to use
15 the deposition in connection with today's testimony, you're
16 going to have to show -- you're going to have to lay a founda-
17 tion as to why it's relevant to today's testimony, and that
18 means that you're going to -- well, the traditional way of
19 doing it is to go into what she testified to. Didn't you
20 testify that -- whatever it is. And then in your cross, you
21 had on your deposition you testified to this.

22 MS. SCHMELTZER: Right. Ms. Barr, you stated that
23 at the time of your deposition you did not -- this is in your
24 direct case testimony. You say, "...I stated that I did not
25 retain a copy of the facsimile that I had sent to NBC in

1 August 1992..." Is that correct?

2 JUDGE SIPPEL: Where is this now?

3 MS. SCHMELTZER: It's paragraph 10.

4 MR. ZAUNER: Well, the document speaks for itself.
5 Why do we --

6 JUDGE SIPPEL: Well, Mr. Zauner, I told her that she
7 has to set this up. She's trying to set it up.

8 MR. ZAUNER: Okay. I'm sorry. But it -- could she
9 identify which, which -- where the direct testimony is that
10 she's --

11 JUDGE SIPPEL: Paragraph 10.

12 MR. ZAUNER: -- quoting from?

13 MS. SCHMELTZER: Paragraph 10.

14 JUDGE SIPPEL: Paragraph, paragraph 10, page 3.

15 MR. ZAUNER: Okay. Because there's also other
16 direct testimony. I'm sorry.

17 BY MS. SCHMELTZER:

18 Q Do you see that, Ms. Barr?

19 A Could you, could you ask the question again?

20 Q I'm just setting it up by saying you have said in
21 the first sentence of paragraph 10 that you stated at your
22 deposition you did not retain a copy of the facsimile that you
23 sent to NBC in August 1992. Do you see that?

24 A Yes, I see that.

25 MR. HOWARD: Could you clarify that's the July 16

1 deposition, 1993?

2 BY MS. SCHMELTZER:

3 Q That's the July 16, 1993, deposition. Do you see
4 that?

5 A Yes, I see it.

6 Q Now, and do you recall that at your deposition you
7 were also asked whether you had -- strike that. Then you say
8 in the next sentence, "...I was asked to -- at the same time,
9 I was asked to describe the facsimile..." Do you see that?

10 A It's the next sentence. I see it.

11 Q Right. "...and I gave a complete and accurate
12 description of the contents of the facsimile."

13 A I see that.

14 Q Now, do you recall being asked at your deposition
15 whether you -- to describe the facsimile that you did not
16 have?

17 A I was asked what was included in the facsimile, what
18 did I ask NBC for, and I described what I had asked them for
19 as best as I can recollect. That's what I did. I asked --
20 you asked me what I asked them for and I told you.

21 Q Do you recall that the question was, "Do you know
22 what the issues were that you asked for?"

23 A I see that that's line 8 on page 109.

24 Q The question at the deposition was, "Do you know
25 what the issues were that you asked for?" And your --

1 MR. GREENEBAUM: Well, I think she's switching facts
2 on the witness.

3 JUDGE SIPPEL: Your -- are, are you saying that this
4 witness is being, is being responsive to that specific ques-
5 tion in her testimony of, of this month, the testimony of '94
6 -- 1994 testimony?

7 MS. SCHMELTZER: I'm saying that what she testified
8 to in 1994 is that she was asked to describe the facsimile.

9 MR. GREENEBAUM: But there may be --

10 MS. SCHMELTZER: And I don't see any question in the
11 July 16, 1993, deposition asking her to describe the facsimi-
12 le.

13 MR. GREENEBAUM: Your Honor, I don't know what Ms.
14 Schmeltzer has in her mind, so I can't really speak to that,
15 but if you're going to impeach a witness you've got to ask her
16 the same question. You can't switch questions or, or, or pick
17 an answer out from other question. Now, if she asked her the
18 same question --

19 MS. SCHMELTZER: I did.

20 MR. GREENEBAUM: -- that she just asked her here,
21 let's show it to her in her deposition and see what her answer
22 was.

23 JUDGE SIPPEL: That's, that's, that's certainly a
24 correct description in terms of what is supposed to transpire
25 with cross-examination, but I want to go beyond that. I, I'm,

1 I'm trying -- what it's -- she's testifying that the -- in the
2 context of her deposition back in 196-- 1993, rather, she gave
3 this description. I don't think that she's testifying that
4 she actually answered a question and answered that way. If
5 she did, point to the question and answer.

6 MS. SCHMELTZER: Ms. Barr, you've said in your
7 direct case testimony that you were asked to describe the
8 facsimile and you gave a complete and accurate description of
9 the contents of the facsimile. Now, if you would look at page
10 109 of your deposition testimony of July 16, 1993, where you
11 had just stated you did not have a copy of that fax -- do you
12 see that?

13 The next question was: "Do you know what the issues
14 were that you asked for?"

15 And you answered: "Yes. They were the issues that
16 were on our programs issues lists from second quarter and
17 third quarter '91."

18 Question: "All of the issues that were on the list,
19 or just some of them?"

20 Answer: "All of the issues relating to this period
21 of time."

22 Is, is there any reference there to asking you to
23 describe the facsimile?

24 MR. HOWARD: Would you -- would she -- I'd ask the
25 counsel to keep reading the -- if she's going to read selec-

1 tively from it about what was asked.

2 MS. SCHMELTZER: Who -- question: "Who did you
3 contact at NBC?"

4 Answer: "I don't remember the woman's name, to be
5 honest with you. It was an archivist or the manager of
6 archives."

7 Question: "Was that to whom you faxed the letter?"

8 Answer: "Yes."

9 MR. HOWARD: Do we, do we have a copy of page 110?

10 JUDGE SIPPEL: Well, I'm going to, I'm going to stop
11 this right here. The problem is is that this is taking, this
12 is taking the cross-examination to a point where it doesn't
13 belong. This witness has testified in a generic sense that
14 she has fully described the contents of the facsimile in her
15 deposition. To have to go through this page by page by page
16 to analyze her description is just a waste of time.

17 MS. SCHMELTZER: Okay. Ms. Barr, do you recall at
18 your deposition telling me the name of the people that you
19 contacted at NBC?

20 WITNESS: You're talking about my deposition from
21 last July?

22 MR. ZAUNER: I'm, I'm going to object. Is this a
23 memory test? How can she --

24 MS. SCHMELTZER: Well, Your Honor, she said she --

25 MR. ZAUNER: Well, show it to her. She --

1 MS. SCHMELTZER: -- gave a complete and accurate
2 description. That's -- those are her -- that's her direct
3 case testimony. "...I gave a complete and accurate
4 description..." And, Your Honor, there's, there's nowhere
5 that we were told to whom this document was even sent.

6 MR. HOWARD: That, that's a mischaracterization of
7 the testimony. It was an archivist or the manager of archives
8 of NBC. That's -- this is why --

9 MR. ZAUNER: It doesn't get any --

10 MR. HOWARD: Your Honor --

11 MR. ZAUNER: -- more specific, you know. The begin-
12 ning of this session I objected to this sentence coming in
13 because the best evidence of what she said would be the testi-
14 mony contained in the transcript. And I believe -- now I'm
15 going to renew my objection, move that that be stricken, and,
16 and move that instead pages 109 --

17 MS. SCHMELTZER: That's fine. We'll do that.

18 MR. ZAUNER: -- be, be -- or 108 and 109 be, be
19 inserted in, in the record in lieu of that sentence.

20 MS. SCHMELTZER: We're perfectly willing --

21 MR. ZAUNER: And let's get on to something else.

22 MS. SCHMELTZER: We're --

23 JUDGE SIPPEL: Well, I -- go ahead, Mr. Howard.

24 MR. HOWARD: And I object to it being stricken
25 because it in fact is true and accurate and, and represents

1 Ms. Barr's interpretation of her testimony at her deposition
2 and her understanding of what --

3 JUDGE SIPPEL: Yeah.

4 MR. HOWARD: And it's very relevant for that --

5 JUDGE SIPPEL: Right. It go --

6 MR. HOWARD: -- point, if nothing else.

7 JUDGE SIPPEL: Yes, I understand that. But it is,
8 it is argumentative and it is conclusive and it's -- it, it
9 forces the proceeding into exactly where we are here. I'm
10 going to say she gave a description. She sure gave a descrip-
11 tion. I'm going to grant, grant the Bureau's motion to strike
12 "complete and accurate." And by doing that I don't -- and I'm
13 not -- there's no adverse inference that it was an inaccurate
14 description. I'm doing that for purposes of avoiding what
15 we're doing here right now with cross-examination. All right.
16 Now, that should then bring us to another subject area --

17 MS. SCHMELTZER: Yes.

18 JUDGE SIPPEL: -- Ms. Schmeltzer.

19 MS. SCHMELTZER: Ms. Barr --

20 JUDGE SIPPEL: Thank you, Mr. Zauner.

21 MS. SCHMELTZER: -- you then state in paragraph 11
22 that more than three months later, on October 26, 1993, Mr.
23 Howard telephoned you. Is that correct?

24 WITNESS: That's what I said.

25 MS. SCHMELTZER: And he asked that you review your

1 files that -- to confirm that you had not misspoken during
2 your deposition. Do you see that?

3 WITNESS: I see that.

4 MS. SCHMELTZER: Now, what I'd like to ask you, Ms.
5 Barr, is -- I'd like to show you a copy of a document that's
6 entitled submission of Subpoena Duces Tecum. It was hand
7 delivered to all counsel on October 22, 1993, and bears a date
8 of October 22, 1993. And I'd just like to ask if you recall
9 seeing that document before it was filed at the Commission or
10 at the time it was filed at the Commission?

11 MR. HOWARD: Objection. May I ask --

12 JUDGE SIPPEL: Go ahead.

13 MR. HOWARD: -- a question. Could we go off the
14 record for just a second?

15 MS. SCHMELTZER: Do you want the witness here?

16 MR. HOWARD: Well, I don't think it's any --
17 (Off the record. On the record.)

18 MR. HOWARD: -- the next party request for the sub-
19 poena that was not served on the --

20 MS. SCHMELTZER: Well, it, it, it was --

21 COURT REPORTER: Excuse me. Are we off?

22 JUDGE SIPPEL: No. We're on the record still.

23 MS. SCHMELTZER: It was later served on you.

24 JUDGE SIPPEL: Do --

25 WITNESS: Yes. Our recollection that it wasn't

1 served at the time that --

2 MR. HOWARD: But it was submitted to the --

3 MS. SCHMELTZER: No. I --

4 MR. HOWARD: I don't understand your premise of your
5 question.

6 MS. SCHMELTZER: All right. Let me have the date
7 that it was served on you? And you should put in the whole
8 document that it came with --

9 MR. HOWARD: That it came with, right.

10 MS. SCHMELTZER: -- not just a portion of that.

11 MS. ABRUTYN: That is the one.

12 MS. SCHMELTZER: No, it's not.

13 MR. HOWARD: Not the way that it was served on
14 Scripps Howard.

15 MS. SCHMELTZER: It was served on Scripps Howard as
16 an, as an exhibit to the --

17 MS. ABRUTYN: A motion --

18 MS. SCHMELTZER: -- motion to -- the Request for
19 Permission to Appeal.

20 MS. ABRUTYN: Well, when --

21 MS. SCHMELTZER: So --

22 JUDGE SIPPEL: All right. Let's, let's go off the
23 record for just a moment here.

24 (Off the record. On the record.)

25 JUDGE SIPPEL: All right. You have a reference, Ms.

1 Schmeltzer?

2 MS. SCHMELTZER: Yes. It's FCC 93-678 released
3 October 27th. It says: "The Presiding Judge has determined
4 it to be appropriate to discuss with the Parties the matters
5 raised in the Request for Permission to File an Appeal of the
6 Order Denying the Request for Issuance of Subpoena Duces Tecum
7 that was filed and hand-delivered by Four Jacks on October 22,
8 1993."

9 MS. ABRUTYN: That's the Request for Permission to
10 Appeal. That's not the subpoena request that you just gave
11 her.

12 MS. SCHMELTZER: But that was the document that was
13 filed on October 22, 1993.

14 MS. ABRUTYN: No, that's not the complete document.

15 MS. SCHMELTZER: Well, maybe it's not the complete
16 document, but it's part of the document.

17 MS. ABRUTYN: If you're going to put it in the
18 record, you should put the complete document in.

19 MS. SCHMELTZER: I wasn't going to put it in the
20 record.

21 MS. ABRUTYN: You're showing it --

22 JUDGE SIPPEL: Well --

23 MS. ABRUTYN: -- to the witness and going to ques-
24 tion her on that.

25 JUDGE SIPPEL: -- the witness is -- you're asking

1 the witness about some document that you don't even know that
2 she's ever seen it before.

3 MS. SCHMELTZER: That's right.

4 JUDGE SIPPEL: Did -- had you seen this document
5 before?

6 WITNESS: You know, to the best of my recollection,
7 I have no memory of seeing this document. I mean, I may well
8 have, but I just don't remember it.

9 JUDGE SIPPEL: All right. Let's move on to some-
10 thing else.

11 MS. SCHMELTZER: Let me show you a copy of an Oppo-
12 sition -- this is an Opposition to a Request for Permission to
13 File an Appeal of the Order Denying the Request for Issuance
14 of the Subpoena Duces Tecum, and that was filed by Scripps
15 Howard Broadcasting.

16 JUDGE SIPPEL: All right. Let's -- the, the initial
17 question is whether or not the witness has any familiarity
18 with this document. Now, let's go off the record so she can
19 look at it.

20 (Off the record. On the record.)

21 JUDGE SIPPEL: I'm sorry. This document is entitled
22 the "Opposition to Request for Permission to File an Appeal.
23 Have you seen this before?

24 WITNESS: Well, I recall most recently seeing it at
25 -- you -- I believe this was the document you showed me at the

1 deposition in July.

2 JUDGE SIPPEL: Did you use this in the deposition?

3 MS. SCHMELTZER: Yes.

4 JUDGE SIPPEL: Is it attached as --

5 MS. SCHMELTZER: Yes, it is.

6 JUDGE SIPPEL: -- a deposition exhibit?

7 MS. SCHMELTZER: Yes, it is.

8 JUDGE SIPPEL: All right. We'll, we'll mark it here
9 as your next exhibit number.

10 MS. SCHMELTZER: That would be Four Jacks Exhibit
11 33.

12 JUDGE SIPPEL: And this is a five-page document
13 entitled Opposition to Request for Permission to File an
14 Appeal of the Order Denying the Request for Issuance of a
15 Subpoena Duces Tecum.

16 (Whereupon, the document referred to
17 as Four Jacks Exhibit No. 33 was
18 marked for identification.)

19 MS. SCHMELTZER: And so that the record is straight,
20 Scripps Howard was ordered to file this by 12 noon on October
21 26, 1993, and that's your Order FCC 93-678.

22 MR. HOWARD: And the date of that order was?

23 JUDGE SIPPEL: October 27, 1993.

24 MR. HOWARD: It was actually provided to Scripps
25 Howard the day before that -- it's dated after the production

1 date.

2 JUDGE SIPPEL: I'm sorry. It was issued October 25.

3 MR. HOWARD: Right.

4 MS. SCHMELTZER: Yes. And the Judge had copies --
5 told counsel they could pick up copies in his office.

6 Okay. Now, Ms. Barr, if you would look at Four
7 Jacks Exhibit 33, and I'd like to ask you if you recall seeing
8 that document prior to its filing at the FCC?

9 WITNESS: This is the Opposition you just handed me?

10 MS. SCHMELTZER: That's correct.

11 WITNESS: I have no memory one way or the other.

12 MS. SCHMELTZER: Do you recall having a discussion
13 with counsel prior to the filing of this document with the FCC
14 about whether or not WMAR-TV's records contained a copy of the
15 correspondence with NBC?

16 MR. HOWARD: Objection.

17 MS. SCHMELTZER: On what basis?

18 MR. HOWARD: Perhaps you'd like the witness to leave
19 the room so I'm not accused of prompting the witness?

20 JUDGE SIPPEL: Would you leave the room, please --

21 WITNESS: Sure.

22 JUDGE SIPPEL: -- for a few minutes? Go off the
23 record.

24 (Off the record.)

25 (Whereupon, the witness temporarily left the

1 courtroom.)

2 (On the record.)

3 MR. HOWARD: Ms. Schmeltzer's question assumes that
4 the presence or absence of the document at WMAR-TV is a -- was
5 an issue with respect to this document, and that is not the
6 case. This was a subpoena to be issued that requested sub-
7 poena for records in the possession of NBC, not of WMAR.

8 JUDGE SIPPEL: That's true. I remember that.

9 MS. SCHMELTZER: Your Honor, this doesn't answer the
10 question because the point is that this pleading made the
11 representation that it would be -- that, that, "Four Jacks'
12 subpoena seeks documents for a broad period of time that may
13 or may not exist."

14 MR. HOWARD: The documents at NBC, yes, that may or
15 may not exist. And that, that, by the way, was a, was a quote
16 from your order of the previous day which directed us to file
17 this document. We were supporting language that you had
18 issued in your order denying them their subpoena.

19 MS. SCHMELTZER: This document also says, "Even if
20 the subpoena were issued, a search, search [sic] for the
21 documents is likely to take some time and cause delay."

22 MR. HOWARD: A search by NBC might take some time
23 and cause delay.

24 MS. SCHMELTZER: That -- it doesn't say by NBC.

25 MR. HOWARD: That's what was at issue.

1 JUDGE SIPPEL: It was, it was a subpoena that was
2 directed to NBC. That was a concern that I had.

3 MS. SCHMELTZER: Well, that's correct. But, but
4 Scripps Howard finally admitted that they -- that WMAR-TV had
5 the documents.

6 JUDGE SIPPEL: Well, we did determine that. That's
7 true. That, that, that came up, but I'm not sure how that --
8 I'm having a difficult time following you in terms of how that
9 ties in with a pleading.

10 MS. SCHMELTZER: Well, Your Honor, I think this --
11 this is a representation made to the FCC that our subpoena
12 sought documents that may or may not exist when in fact the
13 documents certainly did exist and they were very easily dis-
14 covered. And this does not at all say that NBC would have
15 trouble locating them or that NBC had said they might or might
16 not exist.

17 MR. HOWARD: I repeat my position, that is, that is
18 absolutely erroneous. The documents that were being sought
19 were from NBC. We still don't know whether NBC has or hasn't
20 -- doesn't have these documents. We still don't know whether
21 NBC would have taken a lengthy time to do the search. Every-
22 thing in here is completely accurate, because the document
23 deals with documents in possession -- this, this --

24 JUDGE SIPPEL: I'll --

25 MR. HOWARD: -- pleading deals with NBC documents,